

1 ROBERT WAGGENER - SBN - 118450  
2 214 DUBOCE AVENUE  
3 SAN FRANCISCO, CA 94103  
Phone: (415) 431-4500  
Fax: (415) 255-8631  
E-Mail: rwlaw@mindspring.com  
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5 Attorney for Defendant ESAU FERDINAND  
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8 **UNITED STATES DISTRICT COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA**

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11 UNITED STATES OF AMERICA No. CR13 0764 WHO  
12 v. Plaintiff, **NOTICE OF MOTION AND MOTION**  
13 ESAU FERDINAND, **TO SUPPRESS TELEPHONE DATA**  
14 v. Defendant.  
15 \_\_\_\_\_ /  
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Date: October 15, 2015  
Time: 9:00 a.m.  
Crtrm.: Honorable William H. Orrick

17 **TO: THE UNITED STATES DISTRICT COURT; ASSISTANT UNITED STATES**  
18 **ATTORNEYS WILLIAM FRENTZEN AND DAMALI TAYLOR; AND TO THE**  
**CLERK OF THE ABOVE ENTITLED COURT:**

19 **PLEASE TAKE NOTICE** that on October 15, 2015, at 9:00 a.m., or as soon thereafter  
20 as this motion may be heard in the above-referenced Court, Defendant Esau Ferdinand, by and  
21 through his attorney, Robert Waggener, will move this Court for an Order suppressing telephone  
22 data obtained from the cell phone of defendant Esau Ferdinand on October 25, 2011.

23 This motion is made on the grounds that the aforementioned telephone data was obtained  
24 without a warrant in violation of the Fourth Amendment of the United States Constitution.  
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1        This motion is brought pursuant to Rules 12(b)(3)(C) and 41(h) of the Federal Rules of  
2        Criminal Procedure.

3 This motion is based on this Notice, the attached Memorandum of Points and Authorities,  
4 the accompanying declaration of counsel, the records and files in this action, all applicable law,  
5 and on such further pleadings and arguments as may be presented before and at the hearing of  
6 this matter.

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8 || Dated: September 17, 2015

Respectfully submitted,

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10 /s/  
11 ROBERT WAGGNER  
Attorney for Defendant  
ESAU FERDINAND

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# MEMORANDUM OF POINTS AND AUTHORITIES

I.

## STATEMENT OF THE CASE AND INTRODUCTION

4 A Second Superseding Indictment filed on April 14, 2014 charges 11 defendants and 22  
5 counts. Defendant Esau Ferdinand is charged in Counts One (conspiracy to conduct the affairs of  
6 an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(d)), and  
7 Counts Twelve through Fifteen. (alleging acts carried out on April 3, 2011; (Attempted Murder  
8 in Aid of Racketeering (18 U.S.C. § 1959(a)(5)); Assault with a Dangerous Weapon in Aid of  
9 Racketeering (18 U.S.C. § 1959 (a)(3); Maiming in Aid of Racketeering (18 U.S.C. § 1959(a)(2);  
10 and use/Discharge of a Firearm in Furtherance of a Crime (18 U.S.C. § 924 (c)(1)(a)). All the  
11 defendants in the case are alleged to be members or associates of the Central Divisadero Players  
12 violent street gang, also known as the “CDP” gang. The Second Superseding Indictment also  
13 contains a notice of sentencing factors as to Count One. The notice alleges that Ferdinand and  
14 the other defendants agreed to commit the murder of actual and suspected rival gang members,  
15 persons suspected of cooperating with law enforcement, and persons who defied the will of the  
16 CDP.

17 This motion challenges a phone dump of the data content of Esau Ferdinand's cell phone  
18 on October 25, 2011, hours after he was arrested by the San Francisco Police Department. There  
19 is no indication that the search of the phone was pursuant to a warrant and no warrant has been  
20 produced in the discovery in this case.

## II.

## STATEMENT OF RELEVANT FACTS

23 Defendant Esau Ferdinand was arrested by officers of the San Francisco Police  
24 Department on October 25, 2011 pursuant to outstanding arrest warrants. The incident report  
25 referencing Ferdinand's arrest and being held in custody at Southern Police Station (BG005730)  
26 reports the time of the occurrence as 1:30 p.m. When he was arrested, Mr. Ferdinand was in  
27 possession of a cell phone.

1        Within the discovery produced in this case is a 140 page download of the contents of  
 2 “Ferdinand’s Telephone”, a UFED Samsung CDMA SCH-R380 (MetroPCS). (BG005840-6180;  
 3 See Also BG080255-06)) The report is dated Tuesday, October 25, 2011 4:08 p.m.<sup>1</sup> The report  
 4 contains 139 Contacts, over 600 Phone SMS-Text Messages, over 275 Images, and incoming and  
 5 outgoing call information. The government has not produced any search warrant for the contents  
 6 of Mr. Ferdinand’s phone.

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**ARGUMENT**

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**I.**

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**THE WARRANTLESS SEIZURE OF THE DEFENDANT’S CELL PHONE  
DATA WAS ILLEGAL**

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In *Riley v. California*, 573 U.S. \_\_\_, 134 S.Ct. 2473 (2014), the Supreme Court addressed whether the police may, without a warrant, search digital information on a cellphone seized from an individual who has been arrested. *Riley*, 134 S. Ct. at 2480. The *Riley* Court emphasized that the issue before the Court concerned “the reasonableness of a warrantless search incident to a lawful arrest.” *Id.* at 2482. Hence, the Supreme Court reviewed three cases that addressed searches incident to arrest, *Chimel v. California*, 395 U.S. 752 (1969), *United States v. Robinson*, 414 U.S. 218 (1973), and *Arizona v. Gant*, 556 U.S. 332 (2009), and explained this “search incident to arrest trilogy.” *Id.* at 2484. In this case, law enforcement searched Mr. Ferdinand’s cellphone after seizing it from his person during arrest, so *Riley* clearly applies.

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The *Riley* Court addressed whether the search incident to arrest exception applies to the search of a cellphone. *Riley*, 134 S. Ct. at 2482 (“[I]t has been well accepted that [a search incident to arrest] constitutes an exception to the warrant requirement”). The Court in *Riley* declared unwarranted cellphone searches incident to arrest to be an unconstitutional infringement of Fourth Amendment rights. *Id.* at 2480-95. The Court balanced the right of privacy underlying the warrant requirement against countervailing governmental interests, such as officer safety and prevention of evidence destruction, and concluded that the “answer to the question of what police

<sup>1</sup>

The report indicates the “Extraction start date/time” to be 10/25/11 15:56:17.

1 must do before searching a cell phone seized incident to an arrest is accordingly simple - get a  
2 warrant." *Id.* at 2495.

3 Here, the government has not produced any warrant to justify the seizure of the data  
4 contained on Mr. Ferdinand's phone.<sup>2</sup> The phone dump that took place hours after Mr.  
5 Ferdinand's arrest was illegal.

6 **CONCLUSION**

7 For the foregoing reasons, Defendant Ferdinand's telephone data seized on October 25,  
8 2011 should be suppressed.

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10 Dated: September 17, 2015

Respectfully submitted,

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12 /s/

13 ROBERT WAGGENER  
14 Attorney for Defendant  
15 ESAU FERDINAND

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25 <sup>2</sup> It is to be noted that a State of California search warrant for the detail records of a  
26 phone number believed to be used by Esau Ferdinand (650-754-3323) has been produced by the  
27 government in this case. (BG080256) However, the affidavit in support of the warrant has not yet  
28 been produced, and the defense is waiting for a response to the discovery request for the  
affidavit. The warrant was issued by a San Francisco Superior Court Magistrate on April 18,  
2011 and was for detail records between October 25, 2010 and December 6, 2010 (a time period  
surrounding the Jelvon Helton homicide).